(3)

No. 88-97

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

FORD MOTOR CO.,
Petitioner,

v.

GARY BRYANT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

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August 12, 1988

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE*

The American Bar Association ("ABA") moves pursuant to Rule 36.1 of the rules of this Court for leave to file the annexed brief as *amicus curiae* in support of the petition for certiorari filed by Ford Motor Co. on or about July 14, 1988. The ABA believes the United States Court of Appeals for the Ninth Circuit in the case below has issued a ruling that would frustrate the proper invocation of diversity jurisdiction and the right of a party to remove a case promptly to federal court in

appropriate cases under the diversity jurisdiction. The case below severely limits a defendant's access to federal court by establishing that the naming of a "John Doe" defendant in a state complaint *per se* precludes removal under the diversity jurisdiction until the "John Does" are dropped from the complaint, which could be years from the initial filing, depending upon state procedural rules.

The ABA wishes to support the petitioner's position that the Ninth Circuit's decision is in error and is important enough to merit plenary review. The ABA believes the attached brief will be of assistance to the Court. Although counsel for petitioner Ford Motor Co. consented to the filing of this brief, the consent of counsel for respondent Bryant was requested but refused. The ABA therefore requests leave to file the annexed brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

When a civil plaintiff includes a fictitious "John Doe" defendant in a complaint filed in state court, is a non-resident defendant automatically foreclosed from removing the case to federal court based on diversity of citizenship between the actual named parties?

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BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION

INTEREST OF AMICUS CURIAE [1]

The American Bar Association ("ABA") is an organization of more than 340,000 members of the bar, including many lawyers who represent parties in civil litigation. A primary goal of the organization is the promotion of improvements in the operation of the judicial system. In accord with the ABA's interest in the

[1] This brief is accompanied by a Motion For Leave To File, consent of respondent having been requested but refused.

effective functioning of the litigation process, since 1978 the organization has opposed legislation that would abolish or significantly curtail diversity jurisdiction in the federal courts.[2] The ABA believes that the present system of coordinate federal and state jurisdiction, which originated in Article III, section 2, of the Constitution and the Judiciary Act of 1789, 1 Stat. 73, has served the ends of justice well and should not be abandoned.

In the present case [3] the Ninth Circuit adopted a bright-line rule that naming fictitious "John Doe" defendants in a civil complaint destroys diversity of citizenship in all cases. A nonresident defendant may not remove a diversity case to federal court until all of the "John Doe" defendants have been dismissed from the complaint. If left standing, this rule will have a significant and troublesome impact on civil litigation in this country.

On the one hand, the Ninth Circuit's bright-line rule will effectively block a defendant's right of access to the federal courts in diversity cases. Simply by including "John Doe" defendants in a civil complaint, a plaintiff can deny the defendant an opportunity to remove the action for a substantial period of time. In many cases, "John Doe" defendants will not be dismissed by the state court until the eve of trial. Only then, under the Ninth Circuit's ruling, will a nonresident defendant be able to remove a diversity case to

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[2] In June 1978, the ABA adopted the following resolutions:

Be It Resolved, That the American Bar Association opposes the abolition of diversity jurisdiction as provided by S.2389.

Be It Further Resolved, That the American Bar Association opposes the curtailment of diversity jurisdiction by precluding a resident plaintiff from invoking federal jurisdiction as provided in S.2094.

[3] *Bryant v. Ford Motor Company*, 844 F.2d 602 (9th Cir. 1987) (*en banc*), as amended on denial of rehearing and rehearing *en banc*, revising 832 F.2d 1080 (9th Cir. 1987).

federal court. Faced with the additional expense and delay in resolving a lawsuit, entailed by late removal, a defendant is apt not to exercise the right to a federal forum.

On the other hand, defendants may elect to remove the case, even though extensive proceedings have occurred in state court. This would create substantial (and substantially unproductive) delays in the resolution of civil disputes. It would also likely result in relitigation in federal court of issues that were decided in state court.

This case thus raises important issues concerning both the efficient operation of this nation's litigation process and federal-state judicial relationships, issues which are of keen interest to the bar.[4]

REASONS FOR GRANTING THE PETITION

It is important that this Court review the Ninth Circuit decision in the present case, because it is likely to frustrate the proper invocation of diversity jurisdiction by defendants in cases brought not only in California but in a substantial number of other states. This deprivation of the right to remove a case to a federal court will affect not only citizens of those states but citizens of every other state who are sued in California or a state with similar procedures.

Decisions of this Court, prior Ninth Circuit decisions overruled in this case, and decisions in other circuits have all drawn a distinction between two types of unkown

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[4] The relatively low number of reported appellate decisions concerning the application of "John Doe" pleading statutes to removal jurisdiction does not adequately reflect the actual importance of this issue. These questions are rarely heard by appellate courts because the rulings are not appealable at the interlocutory stage; at a later stage the issue is generally moot.

party ("John Doe") situations. In one, a plaintiff does not know the name of an identifiable officer, employee, or agent of a known defendant or of another responsible person or entity, such as a nurse, mechanic, or independent contractor, but the plaintiff may reasonably assert that such a person exists and may be a non-diverse defendant. Although the Federal Rules of Civil Procedure do not provide for naming "John Doe" defendants, state practice often does, and the presence of such allegations may defeat diversity unless the party seeking to invoke diversity jurisdiction is able to show that any "John Doe" defendant would not destroy complete diversity.

The second category is the one illustrated in the present case in which a plaintiff is merely seeking to protect against subsequently discovering that unknown persons should have been named defendants, perhaps after the statute of limitations has run. Prior to the decision in this case, the addition of "John Doe" defendants under these circumstances even in the Ninth Circuit would *not* defeat diversity. Instead the "John Does" would be ignored for purposes of removal jurisdiction.[5]

The Ninth Circuit has here eliminated this distinction in order to provide a bright-line rule. In doing so, the majority opinion discussed only its own prior cases, which it overruled. That opinion, unlike the dissent, did not discuss Supreme Court cases, the principles for which they stand, or the controlling statutes—all of which support the traditional distinction, which permits a party to show that the "John Doe" defendant should be disregarded for purposes of removal because the "John Doe"

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[5] *See, e.g., Hartwell Corp. v. Boeing Co.*, 678 F.2d 842, 843 (9th Cir. 1982); *Grigg v. Southern Pacific Co.*, 246 F.2d 613, 619 (9th Cir. 1957).

has not been named in good faith or because it is a mere fiction.[6]

Insofar as California is concerned, this new rule seems to apply to all cases brought against non-resident defendants. In California practice, "John Doe" allegations are now made as a matter of course. In fact, they are recommended in respectable and, indeed, official form books, which California lawyers follow, perhaps initially simply to avoid possible statute of limitations problems and not to defeat diversity jurisdiction. That means that the "John Doe" allegations in California cannot be deemed fraudulent or sham or unethical in the usual sense. But that is what makes the practice very dangerous to diversity jurisdiction if applied as in this case, for it may affect virtually every case against a non-resident defendant.

Even if diversity jurisdiction would not be completely barred, it could be postponed for the three-year period in which service is permitted under California law or, as indicated by the opinion of the Court of Appeals, until plaintiff drops the Doe defendants or trial commences without their being served. As a practical matter, such a procedure would often delay the removal so long as to impair the prospect of a fair trial. Moreover, such a procedure would not comport with the federal policy,

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[6] *See, e.g., Pullman Co. v. Jenkins*, 305 U.S. 534, 541 (1939) ("[it] is always open to the nonresident defendant to show that the resident defendant has not been joined in good faith and for that reason should not be considered in determining the right to remove."); *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 189-90 (1924); *Chesapeake & Ohio Ry. Co. v. Cockrell*, 232 U.S. 146 (1914); *Illinois Central R.R. Co. v. Sheegog*, 215 U.S. 308, 316 (1909); *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176, 185-86 (1907); *accord* C. Wright, *The Law of Federal Courts* 174 (4th ed. 1983) ("It would make removal jurisdiction more of a game than ever if removal could be defeated by the simple device of naming as a defendant a fictional John Doe.").

embodied in 28 U.S.C. Section 1446(b), that removals be made promptly.

This rule will affect cases in California, which contains one-tenth of the population of the United States. In addition, the ABA is concerned about the prospect of this rule being followed by other circuits where states have similar "John Doe" procedures.[7] The Ninth Circuit ruling is of national significance also because it deprives nonresidents of the opportunity to remove diversity cases to federal courts in the Ninth Circuit. This alone makes the case important enough for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] *See* Note, *Doe Defendants and Other State Relation Back Doctrines in Federal Diversity Cases*, 35 Stan. L. Rev. 297, 300-303 (1983) (reviewing state "Doe" practice rules).